

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Regulation of Prepaid Calling	)	WC Docket No. 05-68
Card Services	)	

**COMMENTS OF EKIT.COM, INC.**

eKit.com, Inc. (“eKit”), by and through its attorney and pursuant to the Commission’s notice of proposed rulemaking released on February 23, 2005,<sup>1</sup> respectfully submits its Comments in the above-captioned proceeding.

**I. Introduction**

eKit is an enhanced prepaid calling provider whose product is marketed to international travelers. The company offers an integrated, enhanced prepaid travel product which includes communications capability, email services, Travel Assistance,<sup>2</sup> Travel “Vault” data storage services,<sup>3</sup> facsimile services (including computer-to-fax services), Internet-based voicemail retrieval and phone-based email retrieval, and much more. Charges for the above services are debited from a customer’s prepaid account. The company also has subsidiaries in the United Kingdom and Australia through which its product is offered.

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<sup>1</sup> See AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, WC Dkt. No. 03-133 and Regulation of Prepaid Calling Card Services, WC Dkt. No. 05-68, *Order and Notice of Proposed Rulemaking*, FCC 05-41, (Feb. 23, 2005)(*Order and NPRM*).

<sup>2</sup> Travel Assistance offers help with visas, embassy information, lost luggage or credit cards, and similar assistance; legal assistance and referrals; and medical help and referrals.

<sup>3</sup> The Travel Vault enables customers to electronically store valuable travel data (such as flight and passport details, accommodation data and similar information) in a secure, encrypted manner.

Enhanced prepaid calling cards are a subset of the emerging stored value card industry. Growing numbers of providers are offering prepaid cards which encompass a wide universe of computer-based functionality. Instead of just offering traditional prepaid calling capability, stored-value cards might, for example, offer voicemail retrieval, Internet access, ATM withdraws, money transfer, or the ability to make retail purchases.<sup>4</sup> Some stored value cards reportedly even have Visa or MasterCard branding. While the market for stored value cards has consisted predominantly of the “unbanked” population (*e.g.*, immigrants, students, *etc.*), they are increasingly gaining wider acceptance. The stored value card market, however, is in its infancy; it is still evolving.<sup>5</sup>

As shown below, further regulation with respect to enhanced prepaid calling card services is simply unnecessary. Established Commission precedent, honed over thousands of pages of rulings that span decades, is adequate to both address the first AT&T variant as well as other enhanced prepaid calling card products.

## **II. Existing Precedent is Adequate to Address the First AT&T Variant**

The Commission should apply its existing enhanced services policies and rules to address the particulars of the first variant of AT&T’s prepaid enhanced calling card service. Instead of

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<sup>4</sup> For more information on the stored-value market, visit [www.intelecard.com](http://www.intelecard.com), and see: Jo Ann Davy, *Prepaid voice mail: Callers worldwide now can leave and retrieve messages using a card-based service*, Intel-CardNews, (Apr. 2002) available at [http://www.intelecard.com/features/03features.asp?A\\_ID=123](http://www.intelecard.com/features/03features.asp?A_ID=123) (last visited Apr. 6, 2005); Jo Ann Davy, *One card, multiple uses: New stored value product offers convenience in a compact form*, Intel-CardNews, (Feb. 2002) available at [http://www.intelecard.com/features/03features.asp?A\\_ID=112](http://www.intelecard.com/features/03features.asp?A_ID=112) (last visited Apr. 6, 2005); Allison Perkins, *Enhanced Prepaid: Offering multi-services with good value to those outside the traditional prepaid market*, Intel-CardNews, (Mar. 2002) available at [http://www.intelecard.com/features/03features.asp?A\\_ID=120](http://www.intelecard.com/features/03features.asp?A_ID=120) (last visited Apr. 6, 2005); and Jenetha Reece, *As good as cash: New stored value cards add value to the prepaid product mix*, Intel-CardNews, (Feb. 2002) available at [http://www.intelecard.com/features/03features.asp?A\\_ID=110](http://www.intelecard.com/features/03features.asp?A_ID=110) (last visited Apr. 6, 2005).

<sup>5</sup> Stored value products are very likely to offer different primary services in the future as the market continues to evolve.

adopting broad-based regulations applicable to prepaid calling card services, the Commission should limit any further action to the specifically-described AT&T variant services.<sup>6</sup>

In its *Order and NPRM* finding that AT&T's enhanced prepaid calling card platform constitutes a telecommunications service, the Commission relies heavily upon the fact that AT&T is not "offering" any "capability" with respect to the advertising message and that the packaging materials for AT&T's enhanced prepaid calling cards do not even mention their possible use as a device for listening to advertisements.<sup>7</sup> The Commission distinguishes the AT&T case before it from its prior decision in *Talking Yellow Pages* since the information service at issue in *Talking Yellow Pages* played advertisements in response to subscribers' individual selections for various categories of information. In other words, customers were able to make active selections and thereby interact with the information service in *Talking Yellow Pages*.

Under the first AT&T variant addressed in the *Order and NPRM*, the customer is given the option to listen to additional information or perform additional functions before listening to the advertising message.<sup>8</sup> The customer does this by making an active selection and interacting with stored information, or if no option is chosen, the caller is directed to dial the destination number and at that point AT&T's platform transmits the advertising message in the same manner as the original version of the AT&T service.

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<sup>6</sup> eKit takes no position with respect to the second AT&T variant (under which enhanced calling card calls are routed using IP technology), except to point out that this matter is likely to be addressed by the Commission's ongoing IP-Enabled Services proceeding. See IP-Enabled Services, *Notice of Proposed Rulemaking*, 19 FCC Rcd 4863 (2004).

<sup>7</sup> See *Order and NPRM* at para. 15.

<sup>8</sup> *Id.* at paras. 11, 38. Apparently, AT&T recently added this type of capability to cards it offers through a partnership with Wal-Mart Stores, Inc.

eKit believes that the *Talking Yellow Pages* precedent clearly establishes that the variant AT&T service is an enhanced or information service. The “Talking Yellow Pages” as offered by Teleconnect Company provided its customers with recorded advertising announcements.<sup>9</sup> Teleconnect offered advertisers a special telephone number which they could include in their print directory advertisements. Callers electing to dial this number obtained recorded information regarding sales, price changes, and other marketing messages. With the changes AT&T has implemented under its variant service, AT&T’s enhanced prepaid calling card service operates virtually identically, in terms of enhanced functionality, to Teleconnect’s “Talking Yellow Pages” service which permitted customers to actively select and access recorded advertising announcements. This led the Commission in *Talking Yellow Pages* to conclude as follows:

...a subscriber to Talking Yellow Pages makes a phone call and hears a recorded advertisement. Thus, Talking Yellow Pages involves “subscriber interaction with stored information,” and falls squarely within the definition of “enhanced service” in Section 64.702(a) of this Commission’s rules, 47 C.F.R. FCC 64.702(a).

Thus, a simple application of the Commission’s *Talking Yellow Pages* ruling is all that is necessary to clarify that AT&T’s first variant service is an enhanced service under the Commission’s regulations. A rulemaking proceeding is not necessary to address this.

### **III. New Regulation is Neither Necessary Nor in the Public Interest**

New regulation of enhanced prepaid calling cards is unnecessary since the Commission’s existing regulatory framework governing enhanced services already serves this purpose. Further, new regulation would not only contravene Sections 230 and 706 of the Telecommunications Act

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<sup>9</sup> See *Opposition of Teleconnect Company to Petition for Declaratory Ruling, In the Matter of Northwestern Bell Telephone Company Petition for Declaratory Ruling* at 8 (Dec. 23, 1986).

of 1996, as amended (“1996 Act”), but it also would impede competition and technological innovation, to the detriment of consumers.

The classification of what constitutes an enhanced service has evolved over decades of policymaking at the Commission as well as before the courts.<sup>10</sup> The Commission actively applies this precedent and its corresponding regulations to distinguish enhanced services from telecommunications services.<sup>11</sup> As Commissioner Kathleen Abernathy has stated, a key question to consider when evaluating whether regulation is necessary is “[w]ould a less regulatory approach, paired with an emphasis on strict enforcement of existing rules, produce greater consumer welfare?”<sup>12</sup> In the instant case, reliance upon the existing regulatory framework would maximize consumer welfare. New regulation is simply not necessary.

The Commission’s enhanced services policies have resulted in the proliferation of innovative, feature-rich products and services which have benefited consumers.<sup>13</sup> Many businesses, including enhanced prepaid providers, have predicated their business models upon

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<sup>10</sup> The Commission launched its *Computer Inquiry* proceedings more than 30 years ago. See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, *Notice of Inquiry*, 7 FCC 2d 11 (1966); Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, *Final Decision and Order*, 28 FCC 2d 267 (1971); Amendment of Section 64.702 of the Commission’s Rules and Regulations, *Tentative Decision and Further Notice of Inquiry and Rulemaking*, 72 FCC 2d 358 (1979); Amendment of Section 64.702 of the Commission’s Rules and Regulations, *Final Decision*, 77 FCC 2d 384 (1980)(*Computer II Final Decision*); Amendment of Section 64.702 of the Commission’s Rules and Regulations, *Report and Order*, 104 FCC 2d 958 (1986) (subsequent cites omitted).

<sup>11</sup> The Commission’s *Order and NPRM* finding AT&T’s enhanced prepaid calling card to be a telecommunications service is but the most recent example. See also, e.g., Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, *Memorandum Opinion and Order*, 19 FCC Rcd 3307 (2004).

<sup>12</sup> See Kathleen Q. Abernathy, *My View from the Doorstep of FCC Change*, 54 FED. COMM. L.J. 199, 204 (2002) (“Regulators should have a healthy skepticism towards any attempt to displace market forces with regulation. Therefore, in each case, I will ask: Is this regulation truly necessary? Is there a market failure? Will the burdens imposed by the proposed regulation outweigh its anticipated benefits? Will it preserve incentives for companies to innovate, and thereby deliver better services and lower prices to consumers? Would a less regulatory approach, paired with an emphasis on strict enforcement of existing rules, produce greater consumer welfare?”).

the Commission's long-standing policies that classify enhanced services. Any change to that classification, particularly as it applies to evolving prepaid value added products, could cause significant industry dislocation, impeding investment and the continued deployment of innovative, low-cost products that benefit consumers.<sup>14</sup>

Adopting rules to regulate enhanced prepaid calling cards risks curtailing competition and its attendant consumer benefits. The Commission's deregulatory policies have long been viewed as the best way to promote the public interest for enhanced services.<sup>15</sup> Further regulation of enhanced prepaid calling cards would inevitably inhibit investment, deter technological innovation and increase costs. The result of this would be that these cost increases would be passed along to consumers in the form of higher prices and more limited service offerings and features.<sup>16</sup>

Perhaps most importantly, further regulation of enhanced prepaid calling cards would run counter to the 1996 Act. Section 230 of 1996 Act expresses Congress' clear preference for a national policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services" unfettered by federal or state regulation.<sup>17</sup> In

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<sup>13</sup> Indeed, enhanced prepaid cards or stored value cards might never have been introduced were it not for the Commission's deregulatory treatment of enhanced services.

<sup>14</sup> As indicated above, the enhanced or stored value prepaid card market is in its infancy and is still evolving. At this point in time, it would be unwise to attempt to fashion comprehensive regulations to govern this new and emerging market.

<sup>15</sup> See, e.g., *Computer II Final Decision*, 77 FCC 2d at 433, ("[W]e believe the market for these [enhanced] services will continue to burgeon and flourish best in the existing competitive environment") (further citations omitted); see Amendment of Section 64.702 of the Commission's Rules and Regulations, *Memorandum Opinion and Order on Further Reconsideration*, 88 FCC 2d 512, 541, n.34 ("we have determined that the provision of enhanced services is not a common carrier public utility offering and that the efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if these services are free from public utility-type regulation.").

<sup>16</sup> See, e.g., Fowler, Halprin, Schlichting, *'Back to the Future': A Model for Telecommunications*, 38 Fed. Com. L. J. 145, 152 (1986).

<sup>17</sup> See 47 U.S.C. § 230(b)(2).

addition, Section 706 of the 1996 Act requires the Commission to encourage deployment of advanced telecommunications capability to all Americans by using measures that “promote competition in the local telecommunications market.”<sup>18</sup> The adoption of prepaid calling card regulations would deter the development of interactive computer services and other advanced telecommunications capability and, in so doing, run counter to the core objectives of the 1996 Act.

#### **IV. Conclusion**

As shown above, new regulations to govern enhanced prepaid calling cards should not be adopted at this time. Further, existing precedent is adequate to address the first AT&T variant service.

Respectfully submitted,

/s/ Thomas K. Crowe

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Thomas K. Crowe  
**LAW OFFICES OF THOMAS K.  
CROWE, P.C.**  
1250 24<sup>th</sup> Street, N.W.  
Suite 300  
Washington, D.C. 20037  
(202) 263-3640  
firm@tkcrowe.com

**COUNSEL FOR EKIT.COM, INC.**

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<sup>18</sup>47 U.S.C. § 157 nt. Section 706 of the 1996 Act is located in the notes of section 7 and this section explains that it is the policy of the United States to encourage the provision of new technologies and services to the public.

**CERTIFICATE OF SERVICE**

I, Mark P. Lesniak, a legal assistant with the Law Offices of Thomas K. Crowe, P.C., certify that on April 15, 2005, a copy of the foregoing *Comments of eKit.com, Inc.*, was served by either first class United States mail, postage prepaid, or by email (as designated) upon the parties listed below.

Chief, Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, DC 20554

Best Copy and Printing, Inc.  
Portals II  
445 12<sup>th</sup> Street SW  
Room CY-B402  
Washington, DC 20554  
(via email: [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com))

/s/ Mark P. Lesniak  
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Mark P. Lesniak